IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 16
5377527

	BETWEEN	MICHAEL WILDBORE Applicant
	AND	RACHEL JERARD Respondent

Member of Authority:	Christine Hickey
Representatives:	James Pullar, counsel for the applicant Karina Coulston, counsel for the respondent
Costs submissions received:	30 November 2012 from the applicant 24 December 2012 from the respondent
Determination:	22 January 2013

COSTS DETERMINATION OF THE AUTHORITY

A. Rachel Jerard to pay Michael Wildbore $1,750.00 in costs.

B. Rachel Jerard to pay Michael Wildbore $71.56 reimbursement for the cost of the Authority filing fee.

[1] On 15 November 2012 I issued a determination in Mr Wildbore's favour. I found that he had been unjustifiably dismissed. He was wholly successful in his claim. I awarded $8,000 in compensation and $3,830.00 in unpaid wages and other benefits and lost remuneration. I reserved costs. The parties have been unable to agree on costs and have supplied memoranda on the issue for my consideration.

The applicant's claim for costs

[2] Mr Wildbore seeks indemnity costs from Ms Jerard. It is more usual for a reasonable contribution towards the successful party's costs to be ordered paid by the unsuccessful party. That is usually on the basis of a notional daily amount of $3,500.00.

[3] Mr Wildbore submits that indemnity costs are warranted because the respondent engaged in conduct which caused him unnecessary additional cost. He says that the applicant failed to attend two scheduled mediation dates. Mr Wildbore submits that the respondent's failure to supply a statement in reply and a statement of evidence as well as her failure to participate in a pre-arranged telephone conference meant that his counsel had to put more time than necessary into preparation for the investigation meeting.

[4] If I consider that indemnity costs are not warranted the applicant submits that a higher than usual award is warranted. The applicant submits that one of the reasons for considering a higher than usual award is warranted is the fact that the applicant sent a without prejudice save as to costs offer to settle the matter to the respondent. The applicant submits that his offer to settle was by way of a *Calderbank* letter.

[5] The request to settle was not accepted by the respondent. The applicant received a greater amount of money in my determination, almost double the amount he had offered to settle for. However, he also incurred greater legal costs than he had at the time the request to settle was made.

[6] The applicant's legal costs began when mediation was first being scheduled. The total legal costs being sought are $4,086.00. He has already paid $1,929.24.

The respondent's response

[7] The respondent submits that there are no reasons why indemnity costs or a higher than usual award of costs should be made. The respondent accepts that she did not engage in the process but says that there were exceptional circumstances at the time.

[8] Ms Jerard submits that there is no reason for the Authority to depart from its usual approach being that costs are not awarded in respect of mediation.

[9] Ms Jerard accepts that she failed to supply wage and time records but does not accept that put the applicant to significantly greater costs. She also accepts that she

failed to supply a statement in reply but does not accept that would have put Mr Wildbore to further cost.

[10] Ms Jerard says that because she was unrepresented at the time the offer to settle was made and was dealing with *significant emotional trauma during that period* and so she was unaware of the significance of the offer and its possible repercussions in costs.

[11] Ms Jerard submits that it is not appropriate to award indemnity costs or costs of more than $1,500.00 which she calculates are payable under the daily tariff approach.

Determination

[12] The Authority's power to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000. Costs are at the discretion of the Authority, as observed by the now Chief Judge Colgan in *NZ Automobile Association Inc v McKay.*[1]

[13] The leading case on costs in the Authority is the decision of the full court of the Employment Court in *PBO Ltd (formerly Rush Security) v Da Cruz.*[2] The following well established principles apply to costs in the Authority:

a. The Authority has a discretion on whether to award costs and if so what amount.

b. The discretion must be exercised in accordance with principle and not arbitrarily.

c. The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.

d. Equity and good conscience must be considered on a case by case basis.

[1] [1996] 2 ERNZ 622 at 647
[2] [2005] ERNZ 808

e. Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

g. Without prejudice offers can be taken into account.

h. Awards of costs will be modest.

i. Frequently costs are judged against a notional daily rate, which is currently $3,500.00.

j. Costs generally follow the event; that is, the successful party's costs are likely to be ordered paid by the unsuccessful party.

k. The nature of the case can also influence costs. That means that the Authority orders that costs lie where they fall in certain circumstances.

[14] I have had regard to those key principles when fixing costs in this matter.

[15] I need to assess whether the costs claimed by Mr Wildbore are reasonable. The case was a relatively straightforward one. Even had Ms Jerard participated fully the investigation meeting would not have taken more than one day of hearing time; possibly only half a day. The costs incurred are reasonable in the circumstances.

[16] I consider the starting point for setting a reasonable contribution to Mr Wildbore's costs is $1,750.00 being for half a day.

[17] I now need to assess whether the factors identified by the applicant should mean that I increase that amount.

Did the respondent's failure to engage in the process increase the applicant's costs?

[18] First, I do not consider the respondent's failure to attend the mediations is something that I can award Mr Wildbore costs in relation to. It is a well established principle in the Authority that parties bear their own costs related to mediation. That

is based on the policy that there is some public good in attempting to resolve matters by way of agreement relatively early and relatively inexpensively.

[19] I acknowledge that the respondent's failure to supply a statement in reply and any written statement of evidence was frustrating for the applicant. However, I agree with the respondent's submission that the case was a relatively straightforward one with relatively narrowly defined issues. Although frustrating I do not consider the respondent's failure to engage with the Authority's process caused such increased costs as to warrant an increase in the amount of costs to be paid.

[20] It follows I do not consider this case to be so extraordinary as to attract indemnity costs.

Does the applicant's request to settle mean the respondent should pay greater costs than the usual tariff approach?

[21] A *Calderbank* offer to settle the matter without prejudice as to costs is one in which during proceedings the respondent makes an offer to settle with the applicant. If the applicant refuses to settle on that basis and proceeds and is wholly unsuccessful or recovers less than was offered then the fact of the Calderbank offer can be taken into account in the exercise of the Authority's discretion and may increase any costs awarded against the applicant.

[22] In this case the applicant's request to settle made in its letter of 19 June 2012 is not a true *Calderbank* offer. It is a Calderbank-like offer in only one way, that is that it was an offer to settle for a lesser sum than was subsequently awarded. The statement of problem was not lodged with the Authority until 20 August 2012. Therefore, as at the date of Mr Wildbore's request to the respondent to settle with a cash payment there were no proceedings afoot.

[23] That approach which was not responded to by the respondent cannot 'sound in costs'. The proceedings had not been lodged and the applicant had not specified exactly what would be sought in the Authority. It was reasonable for the respondent at that early time to refuse to settle with the applicant. Therefore, I consider that there

are no factors that mean that I should award more than the amount of $1,750.00 in costs to be paid by Ms Jerard to Mr Wildbore.

[24] However, Ms Jerard must also reimburse Mr Wildbore the $71.56 that he spent to file the matter in the Authority.

Christine Hickey
Member of the Employment Relations Authority